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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 DANIEL LOPEZ,

12 Plaintiff,

13 vs.

14 MICHAEL ST. CLAIR, et al.,

15 Defendants.
16

CASE NO. 14cv2145-LAB (DHB)

**ORDER DENYING MOTION FOR
SUMMARY JUDGMENT**

17 Daniel Lopez brings this lawsuit against the owners and operators of a Valero gas
18 station located at 301 E. San Ysidro Blvd. in San Diego, California ("St. Clair Defendants").
19 (Docket no. 1.) He alleges that the gas station is not adequately accessible because the
20 path of travel from the handicap parking space to the entrance of the gas station
21 convenience store is too narrow. (*Id.*) He asserts a negligence claim and causes of action
22 arising under the Americans with Disabilities Act, California's Unruh Civil Rights Act, and
23 California's Disabled Persons Act. (*Id.*) Lopez has moved for summary judgment. (Docket
24 no. 27.)

25 The parties' arguments center on whether the removal of architectural barriers at the
26 gas station would be "readily achievable."

27 Lopez contends that the St. Clair Defendants could "simply . . . widen the walkway
28 approximately one foot, and change the door leading into the store so that it swings inward,

1 rather than outward.” (Docket no. 27 at 3.) As part of widening the walkway, he suggests
 2 that the St. Clair Defendants “remove the 4 inches of wainscoting around the building.” (*Id.*
 3 at 7.) Lopez’s proposal would reduce the distance between the convenience store curb and
 4 the gasoline dispenser island from 18’ 4” to 17’ 5”. (Docket no. 35 ¶ 11.) The St. Clair
 5 Defendants maintain that removal isn’t readily achievable because:

6 (1) That space is currently used for parking and through-traffic, but under Lopez’s
 7 proposal it will be too small to accommodate both functions, and patrons would need
 8 to use the public street to get from one side of the facility to the other. The size and
 9 circulation issues would preclude the City of San Diego from approving a building
 10 permit.

11 (2) The difficulty and cost of obtaining a “Discretionary Building Permit” would be an
 12 undue-burden.

13 (3) Even if a building permit wasn’t required, they still couldn’t go forward with Lopez’s
 14 proposed changes because the San Diego Municipal Code forbids work that’s in
 15 violation of the building regulations.

16 (4) The brick facade wainscoting may be structural and not removable.

17 (5) Lopez’s proposal presents safety concerns caused by: cars attempting to pass in
 18 a parking lot with inadequate space; and the required removal of a cash drawer that
 19 allows cashiers to lock the front door and sell from a protected area.

20 (Docket no. 30.)

21 To support their arguments, the St. Clair Defendants rely on a request for Preliminary
 22 Review that their expert submitted to the City of San Diego, and the City’s response. (*Id.* at
 23 12.) The request asked:

24 Improvements being considered are the widening of the private sidewalk ramp
 25 leading to the store. The widened sidewalk will encroach into an area now used to support
 26 vehicle circulation. An aisle now 18’-4” wide that allows two vehicles side-by-side (one
 27 vehicle fueling and one vehicle circulating) will be narrowed. The narrowed aisle would not
 28 support two vehicles side-by-side and circulation from one side of lot to the other would
 require the use of the adjacent public streets. Is the proposed situation allowable?

(*Id.*) The City responded:

SDMC 142.0506 (d) (2) states: "Vehicular circulation from one aisle to another on the same premises shall not require the use of a public street."

. . . This would preclude the design proposed."

(*Id.*) They also provided a report by their expert, Kirk Bradbury, to support their arguments. Docket no. 30, Exhibit 5 at 5–8; Exhibit 7 at 1–2.)

Lopez argues that the St. Clair Defendants waived any arguments based on financial considerations. Specifically, to resolve a discovery dispute, and to avoid producing financial information that it deemed sensitive, the St. Clair Defendants stipulated that, in determining whether the removal of a barrier is readily achievable,

factors such as the (1) Stipulating Defendants' financial resources; (2) the facility's financial resources; (3) the "effect on expenses and resources"; and (4) impact on finances, shall NOT be raised by [the St. Clair Defendants] as a defense as to why [they] cannot remedy and/or remove those alleged BARRIERS.

(Docket no. 27, Exhibit 10.) He also argues that: (1) the City's response to the St. Clair Defendants' request isn't determinative because it doesn't control a decision on a permit application, and the question didn't explain that the proposal was meant to meet ADA guidelines; (2) federal requirements supersede conflicting local law; (3) the safety concerns are speculative; and (4) Lopez's expert's report discusses an alternative method to achieve compliance, but the St. Clair Defendants don't address it. (Docket no. 33 at 2–8.)

I. Summary Judgment Standard

Summary judgment is appropriate where the evidence shows "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). All reasonable inferences from the evidence are drawn in favor of the nonmoving party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 242 (1986).

If the moving party meets its burden, the burden shifts to the nonmoving party opposing the motion, who must "set forth specific facts showing that there is a genuine issue

1 for trial.” *Anderson*, 477 U.S. at 256. Summary judgment is warranted if a party “fails to
 2 make a showing sufficient to establish the existence of an element essential to that party’s
 3 case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322.
 4 A genuine issue of fact exists if “the evidence is such that a reasonable jury could return a
 5 verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248. A fact is material if it “might
 6 affect the outcome of the suit under the governing law.” *Id.*

7 **II. Disability Discrimination Standard**

8 Disability discrimination includes “a failure to remove architectural barriers . . . in
 9 existing facilities . . . where such removal is readily achievable.” 42 U.S.C. § 12182(b)(2)
 10 (A)(iv). The ADA defines “readily achievable” as “easily accomplishable and able to be
 11 carried out without much difficulty or expense.” 42 U.S.C. § 12181(9).

12 “The Ninth Circuit has yet to rule on whether the plaintiff or defendant bears the
 13 burden of proof in showing that removal of an architectural barrier is readily achievable, but
 14 the Ninth Circuit and several district courts within the Ninth Circuit have applied the
 15 burden-shifting framework set forth in *Colorado Cross Disability Coalition v. Hermanson*
 16 *Family, Ltd.*, 264 F.3d 999 (10th Cir. 2001).” *Yates v. Bacco*, 2014 WL 1089101, at *5 (N.D.
 17 Cal. Mar. 17, 2014) (internal brackets and quotation marks omitted). In *Colorado Cross*, the
 18 Tenth Circuit held that the plaintiff bears the initial burden of proving (1) the existence of an
 19 architectural barrier and (2) suggesting a method of removing the barrier that is “readily
 20 achievable,” that is, “easily accomplishable and able to be carried out without much difficulty
 21 or expense.” *Colorado Cross*, 264 F.3d at 1002–03. If the plaintiff satisfies his burden, the
 22 burden shifts to the defendants to show that removing the architectural barrier is not readily
 23 achievable. Defendants “bear[] the ultimate burden of persuasion that barrier removal is not
 24 readily achievable.” *Id.* at 1003. *Colorado Cross*’ burden-shifting framework applies here.

25 **III. Consideration of Financial Factors**

26 Lopez complains that, despite their stipulation, several of the St. Clair Defendants’
 27 arguments are tangentially related to their finances. (Docket no. 33 at 3.) In determining
 28 whether an action is readily achievable, factors to be considered include:

1 (A) the nature and cost of the action needed . . . ;

2 (B) the overall financial resources of the facility or facilities involved in the
3 action; the number of persons employed at such facility; the effect on expenses
4 and resources, or the impact otherwise of such action upon the operation of
5 the facility;

6 (C) the overall financial resources of the covered entity; the overall size of the
7 business of a covered entity with respect to the number of its employees; the
8 number, type, and location of its facilities; and

9 (D) the type of operation or operations of the covered entity, including the
10 composition, structure, and functions of the workforce of such entity; the
11 geographic separateness, administrative or fiscal relationship of the facility or
12 facilities in question to the covered entity.

13 42 U.S.C. § 12181(9)(A)–(D). Thus, “[t]he amount of [the St. Clair Defendants’] overall
14 financial resources is only one of the factors to be considered.” *Mannick v. Kaiser Found.*
15 *Health Plan, Inc.*, 2006 WL 1626909, at *12 (N.D. Cal. June 9, 2006). In *Mannick*, the
16 plaintiff’s argument centered on the defendants’ significant financial resources. *Id.* at *11.
17 The court denied the plaintiff’s summary judgment motion, explaining that he “ha[d] failed to
18 incorporate the other factors into the calculus, such as the expense and difficulty of removing
19 the barriers, [and] the impact of barrier removal on [the defendants’] ability to provide medical
20 care to its patients.” *Id.* at *12. Likewise, cost and burden remain relevant considerations
21 here, even if their impact on the St. Clair Defendants’ finances is not.

22 **IV. Federal Preemption**

23 In response to the St. Clair Defendants’ building permit arguments, Lopez’s reply brief
24 argues that federal accessibility requirements supersede conflicting local law. (Docket no.
25 33 at 3–5.) Congress has the power to preempt state law. U.S. Const. Art. VI, cl. 2;
26 *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). There are two types of implied
27 preemption: conflict preemption and field preemption. *Montalvo v. Spirit Airlines*, 508 F.3d
28 464, 470 (9th Cir. 2007). Lopez relies on the former. (Docket no. 33 at 4.)

In all preemption cases, and particularly in those like this one where Congress has
legislated in a field which the States have traditionally occupied, courts “start with the
assumption that the historic police powers of the States were not to be superseded by the
Federal Act unless that was the clear and manifest purpose of Congress.” *Medtronic, Inc.*

1 *v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted); *Yates*, 2014 WL
 2 1089101, at *10. Since Lopez is “the party who asserts that a state law is preempted,” he
 3 “bears the burden of so demonstrating.” *Holt v. Foodstate, Inc.*, 2015 WL 9592534, at *3
 4 (S.D. Cal. Dec. 31, 2015).

5 To support his argument, Lopez relies on a conversation between his expert and the
 6 person that responded to his request for Preliminary Review. (Docket no. 33 at 5.)
 7 According to Lopez’s expert, the reviewer “stated that the appropriate question for
 8 submission would be whether a building permit would be required to widen a private sidewalk
 9 to meet ADA guidelines, which defendants’ submission did not mention.” (*Id.*, Exhibit 3.)
 10 Lopez contends that this shows “the importance of indicating that the purpose of the project
 11 is to comply with ADA requirements.” (*Id.* at 5.) Lopez’s argument doesn’t establish that
 12 Congress meant to supersede state law governing the issuance of building permits. Indeed,
 13 “[r]emoval of barriers under the ADA is a conditional rather than absolute requirement”; it
 14 “may be excused if it is not ‘readily achievable.’” *Yates*, 2014 WL 1089101, at *10. “Nothing
 15 in the ADA precludes the court from determining in a particular instance that ‘readily
 16 achievable’ includes consideration of whether a suggested repair would be permitted under
 17 a state building standard.” *Id.* Nor does it preclude consideration of the difficulty and
 18 expense involved with any permitting required to remove barriers. And ADA regulations
 19 provide that “no measure shall be taken . . . that poses a significant risk to the health or
 20 safety of individuals with disabilities or others.” 28 C.F.R. § 36.304(d)(3). Lopez hasn’t
 21 established preemption.

22 **V. Lopez’s Alternative Method**

23 Lopez’s expert suggests a second method to remedy the gas station’s compliance
 24 issue. (Docket no. 33, Exhibit 1.) He recommends “creating a new door on the north side
 25 of the store and rearranging the interior of the store.” (*Id.* at 6.) Lopez didn’t raise this
 26 argument in his summary judgment motion; he raised it for the first time in his reply. Thus,
 27 the Court won’t consider it. *Lane v. Dep’t of Interior*, 523 F.3d 1128, 1140 (9th Cir. 2008)
 28 (noting consideration of an argument first raised in a reply brief is discretionary).

1 **VI. Issues of Fact Remain**

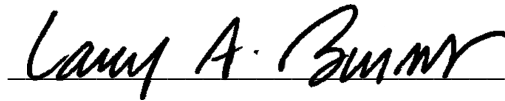
2 This case turns on whether removing barriers at the gas station is unduly difficult and
3 expensive. The St. Clair Defendants argue that it is. Lopez argues that it is not. Both
4 parties present evidence to support their position. And the evidence shows that there
5 remains genuine issues of material fact.

6 **VII. Conclusion**

7 Lopez's motion for summary judgment is **DENIED**. The parties shall contact Judge
8 Bartick within four days of this order to reschedule all pretrial dates.

9 **IT IS SO ORDERED.**

10 DATED: September 6, 2016

A handwritten signature in black ink, reading "Larry A. Burns", is written over a horizontal line.

11
12 **HONORABLE LARRY ALAN BURNS**
United States District Judge